GUINNESS ANCHOR MARKETING SDN BHD

v.

CHELLAM JOE VETHA THYA SINGH

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-51-1997]
26 FEBRUARY 1999

CIVIL PROCEDURE: *Appeal - Decision of Senior Assistant Registrar to grant summary judgment - Issues of law raised by defendant to counter plaintiff's application for summary judgment - Whether granting of summary judgment correct*

PARTNERSHIP: *Liabilities of partners - Debt - Partnership Act 1961, s. 11 - Whether joint liability - Whether judgment obtained against one partner prevents fresh or further proceedings from being instituted against other partners*

CIVIL PROCEDURE: *Action - Claim for goods sold and delivered - Liability of defendant - Partnership Act 1961, s. 11 - Whether jointly liable with other partners - Judgment in default of appearance obtained against other partners - Whether plaintiff prevented from instituting fresh or further proceedings against defendant - Withdrawal of earlier suit by plaintiff against defendant upon settlement agreement - Breach thereof by defendant - Whether plaintiff entitled to institute fresh or further proceedings against defendant*

CONTRACT: *Goods sold and delivered - Failure to settle invoices - Liability of defendant - Partnership Act 1961, s. 11 - Whether jointly liable with other partners - Judgment in default of appearance obtained against other partners - Whether plaintiff prevented from instituting fresh or further proceedings against defendant - Withdrawal of earlier suit by plaintiff against defendant upon settlement agreement - Breach thereof by defendant - Whether plaintiff entitled to institute fresh or further proceedings against defendant*

CIVIL PROCEDURE: *Settlement - Action against defendant withdrawn upon settlement agreement - Breach thereof by defendant - Whether plaintiff entitled to institute fresh or further proceedings against defendant - Subsequent agreement entered by plaintiff and one chargor to secure payment of defendant to plaintiff - Whether defendant discharged from settlement agreement*

The plaintiff obtained a summary judgment against the defendant for moneys owing to the plaintiff by virtue of goods sold and delivered to the defendant. Hence, the instant appeal by the defendant.

The plaintiff had previously filed a suit against the defendant and his three other partners of one Teck Hai Enterprise and had obtained judgment in default of appearance against the said three partners. The action against the defendant was withdrawn upon a settlement agreement reached between the plaintiff and the defendant. When the defendant breached the said agreement, the plaintiff applied for the said summary judgment. In the alternative, the plaintiff claimed against the defendant for breach of the settlement agreement.

The issues for determination were: (i) whether the defendant should be jointly liable for the debt owing to the plaintiff pursuant to s. 11 of the Partnership Act 1961 in view of the previous suit wherein the defendant was sued in his capacity as a partner; (ii) whether the plaintiff was unable to maintain this action as its cause of action was exhausted with the entry of judgments in default against the other three partners in the previous suit; (iii) whether cl. (c) of the settlement agreement that stipulated that in the event of default of payment of the sum of RM250,000 the defendant was liable to pay the whole sum of RM1,289,035.98 was nothing more than a penalty and that the plaintiff must still prove actual damages; and (iv) whether the subsequent agreement entered into by the plaintiff with one chargor who had charged her property to the plaintiff to secure payment by the defendant to the plaintiff, discharged the defendant from the settlement agreement.

A preliminary objection was raised by the defendant, *ie*, whether summary judgment could be entered against the defendant in view of the questions of law that were raised by the defendant to counter the plaintiff's application for the said summary judgment.

Held:

[1] When the point raised is in fact a point of law of some difficulty and it involves lengthy argument then the court has no option but to dismiss the summary application and direct the parties under O. 14 r. 6 of the Rules of the High Court 1980 to try the issue under O. 33 r. 2 of the said rules by way of a notice of motion.

[2] By virtue of s. 11 of the Partnership Act 1961, the liability of the defendant as a partner for the debt owing to the plaintiff was one of joint liability with the other partners in the partnership. The judgment entered against one will prevent fresh or further proceedings being instituted against the others. This will only apply when the cause of action is only one and the same against the defendants.

[2a] However, as the defendant had breached the settlement agreement, this did not bar the plaintiff from instituting fresh proceedings against him.

Further, by cl. (c) of the settlement agreement, the plaintiff reserved its right to institute fresh proceedings against the defendant. Alternatively, the settlement agreement constituted a fresh contract between the two parties and as such the present suit was based on that distinct cause of action. When causes of action are different, the issue of the plaintiff being unable to proceed against the defendant for the reason of the existence of judgments against the defendant's partners does not arise at all.

[3] Clause (c) of the settlement agreement was not a penalty as the sum stipulated was not extravagantly or unconscionably greater than the loss which was liable to result from the breach of contract. Further, the plaintiff's claim for actual loss was proven through the affidavit in encl. 36 which enclosed the relevant invoices. The defendant did not deny the contents of encl. 36 as there was no affidavit in rebuttal filed by the defendant. There was a blatant breach of the settlement agreement by the defendant.

[4] The settlement agreement between the plaintiff and the chargor was separate and distinct from the settlement agreement between the plaintiff and the defendant. Furthermore, all the payments by the chargor were taken into consideration by the plaintiff in arriving at the amount of debt which was due and owing to the plaintiff from the defendant.

[5] The defendant failed, refused and neglected to settle any of the balance amount outstanding and owing to the plaintiff pursuant to the terms of the settlement agreement. At the date of the filing of the plaintiff's application for summary judgment, the debt due and owing to the plaintiff from the defendant was colossal.

[Appeal dismissed.]

Case(s) referred to:

Abbott v. Smith [1760] 2 Black W 947 ***(refd)***

Allied Marine Transport Ltd v. Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 ***(refd)***

Attorney-General v. Nissan [1969] 1 All ER 629 ***(refd)***

Bright v. Tyndall 4 Ch D 189 ***(refd)***

Debenham's Limited v. Perkins [1925] 133 LT 252 ***(refd)***

Dorothy Kwong Chan v. Ampang Motors Ltd & Anor [1969] 2 MLJ 68 ***(refd)***

Duncan v. Lambeth London Borough Council [1968] 1 QB 747 ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1915] AC 79 ***(refd)***

Electric and General Contract Corp v. The Thomson-Houston Electric Co [1895] 10 TLR 103 ***(refd)***

European Asian Bank AG v. Punjab and Sind Bank [1983] 2 All ER 508 ***(refd)***

Ex p Stark [1897] 1 Ch 575 ***(refd)***
Government of Malaysia v. Thelma Fernandez & Anor [1967] 1 MLJ 194 ***(refd)***
Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***
Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 ***(refd)***
Hammond v. Schofield [1891] 1 QB 453 ***(refd)***
Henry JB Kendall and Others v. Peter Hamilton [1879] 4 App Cas 504 ***(refd)***
Holwell Securities Ltd v. Hughes [1974] 1 WLR 155 ***(refd)***
Kesang Leasing Sdn Bhd v. Longwood Sdn Bhd & 3 Ors [1988] 2 MLJ 328 ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(foll)***
McIver v. Richardson [1813] 1 M ***(refd)***
Moore v. Flanagan And Wife [1920] 1 KB 919 ***(refd)***
Mozley v. Tinkler [1835] 1 CM ***(refd)***
Osman Haji Mohamed v. Chan Kang Swi [1924] 4 FMSLR 292 ***(refd)***
Overseas Investment Private Limited v. Anthony William O'Brien & Anor [1988] 2 CLJ 238 ***(refd)***
Pershowa Leasing (M) Sdn Bhd v. Kin Shipping Line Sdn Bhd & Ors [1988] 1 MLJ 540 ***(refd)***
Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461 ***(refd)***
Republic of Bolivia v. Bolivian Navigation Co 24 WR 361 ***(refd)***
Robinson's Executor's Case [1856] 6 De GM ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 1 MLJ 817 ***(refd)***
Sumner v. William Henderson & Sons [1963] 1 WLR 823 ***(refd)***
Tinn v. Hoffman & Co [1873] 29 LT 271 ***(refd)***

Legislation referred to:
Partnership Act 1961, ss. 11, 14
Rules of the High Court 1980, O. 14 rr. 4(1), 6, O. 33 r. 2

Partnership Act 1890 [UK], s. 9

Other source(s) referred to:
Chitty on Contracts, 27th edn, vol 1, p 1473
The Malaysian Law of Partnership: Cases and Materials, ER Hardy Ivamy & Vincent-Power Smith

For the plaintiff - Kwan Kin Sum; M/s Skrine & Co
For the defendant - Jeyakumar Sundralingam; M/s Reginald Vallipuram & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Preliminary Observations

On 25 August 1998, the Senior Assistant Registrar ('SAR') acceded to the plaintiff's application by way of a summons in chambers in encl. 37 and

ordered the defendant to pay to the plaintiff by way of a summary judgment a sum of RM1,115,950.48 together with interest thereon at the rate of 8% per annum from 26 December 1996 until full payment and costs of RM350. Being aggrieved, the defendant lodged an appeal to the judge in chambers as reflected in encl. 45.

Enclosure 37 was supported by an affidavit of Kwong Poh Yoke affirmed on 7 July 1998 and filed on 10 July 1998 and marked as encl. 36. There was no affidavit in reply filed by the defendant in response to encl. 36 and the defendant merely raised questions of law to counter the plaintiff's application in encl. 37. Order 14 r. 4(1) of the Rules of the High Court 1980 ('RHC') states:

> A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court.

and Mr. Jeyakumar Sundralingam for the defendant argued that by raising points of law he was in fact introducing evidence of "or otherwise to the satisfaction of the court". There was nothing novel about this submission. In the case of *European Asian Bank AG v. Punjab and Sind Bank* [1983] 2 All ER 508 CA, the court there made it clear that it would not hesitate to decide questions of law under O. 14. This was what Robert Goff LJ said at p. 516:

> Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 KB 464, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Order 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see *Verral v. Great Yarmouth BC* [1980] 1 All ER 839 at 843, 845-846, [1981] 1 QB 202 at 215, 218, per Lord Denning MR and Roskill LJ). The policy of Order 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit (see *Bank fur Gemeinwirtschaft v. City of London Garages Ltd* [1971] 1 All ER 541 at 547-548, [1971] 1 WLR at 158, per Cairns L.J. a case concerned with a claim on a bill of exchange by a holder in due course).

A word of caution must be registered. The case of *European Asian Bank AG v. Punjab and Sind Bank [supra]* is not an authority for the proposition that the Malaysian Courts will hesitate and disallow summary judgment to be entered once a question of law is raised. On the contrary this case emphasises

that if the objection is indeed a question of law then the court will not enter summary judgment. It is the court that will determine whether the question raised is in fact a question of law.

At the local scene is the decision of the Supreme Court in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 where the court held that where there were issues of law then the case was not an appropriate one for summary judgment. Hashim Yeop Sani SCJ (as he then was) delivering the judgment of the Supreme Court made these trenchant observations:

> The approach to be taken by an appellate court in an Order 14 appeal has been settled. The first principle is that the appeal court should not regard the appeal as a reviewing of the exercise of the judge's discretion but should in practice approach the appeal as a rehearing. This principle is already accepted by this court in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd.* [1984] 2 MLJ 300 which was also an Order 14 appeal where this court considered and followed *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508, 516.
>
> What is involved in the present appeal is the other principle considered in European Asian Bank by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O. 14 application. In this regard several principles are involved. First, the court hearing an O. 14 application should work within the framework of O. 14 and not embark on an exercise under O. 33 r. 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.
>
> In *Cow v. Casey* [1949] 1 All ER 197 the legal question contended by the defence to be reasonably arguable was the point of law on sub-tenancy and the protection of the Rent Restriction Acts. Lord Greene MR said at p. 481:
>
> > If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the master was perfectly right, the judge was perfectly right, and the appeal should be dismissed.

Referring to *Cow v. Casey* Goff L.J. in European Asian Bank said at page 516 on the functions of the appellate court:

> But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 K.B. 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Order 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand.' It may offend against the whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal.

It should be noted however that Goff L.J. was cautious in his language when he said where 'a clear-cut issue' is raised and 'when full argument has been addressed to the court.' For it may offend the purpose of O. 14 for the court not to decide a case which raises a clear-cut issue of law and when the court has the benefit of full argument. We alluded earlier to the issues raised in paragraphs 4 and 12 of the statement of defence which in our view are factors making this case not an appropriate one for summary judgment.

The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

In my considered view, when the point raised is in fact a point of law of some difficulty and it involves lengthy argument then the court has no option but to dismiss the summary application and direct the parties under O. 14 r. 6 of the RHC to try the issue under O. 33 r. 2 of the RHC by way of a notice of motion. The English court in *Electric and General Contract Corp v. The Thomson-Houston Electric Co* [1895] 10 TLR 103 granted leave to defend when the court there found that the point of law was difficult as it involved lengthy argument. The court there too held that in such cases it would not be possible to decide satisfactorily in chambers as it tended to put the judge off guard and in a false position. Order 33 r. 2 of the RHC states as follows:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

and, of course, the court can, if necessary, direct that a question or issue shall be stated (*Duncan v. Lambeth London Borough Council* [1968] 1 QB 747; [1968] 2 WLR 88). It must be borne in mind that only questions of law can be raised which must necessarily arise and flow from the action (*Republic of Bolivia v. Bolivian Navigation Co* 24 WR 361). Fictitious questions will be discarded and not decided by the courts (*Bright v. Tyndall* 4 Ch D 189; and *Sumner v. William Henderson & Sons* [1963] 1 WLR 823, [1963] 2 All ER 712n). But there are disadvantages in ordering the trial of a preliminary point of law on assumed facts. The case of *Attorney-General v. Nissan* [1969] 2 WLR 926 HL; [1969] 1 All ER 629 HL serves as a good example. There Lord Wilberforce laid down the disadvantages in this way, ([1969] 2 WLR 926 at pp. 952 to 953; [1969] 1 All ER 629 at p. 653):

> My Lords, this appeal comes before this House in an unsatisfactory manner. Your Lordships are asked to decide questions of law, which may be of great constitutional range and importance, upon the basis of allegations of fact made in the pleadings, not fully stated or admitted, and which must be assumed, quite possibly contrary to what may be found at the trial, to be true. The main issue is as to the respondent's claim for the occupation of and damage to his hotel by Her Majesty's forces: but the circumstances in which possession of the hotel was taken are disputed. Moreover, although one would think that, as the claim relates to an immovable in a foreign country, the law of that country would be of some relevance, the pleading on both sides studiously avoids any commitment as to the legality or otherwise of what was done. Reference is made in the defence to an alleged ratification in writing on December 30, 1963, of the taking of the hotel signed by the President and Vice-President of Cyprus but we have not been referred to the Constitution of Cyprus, to the treaty between the United Kingdom and Cyprus of 1960, to any agreement regulating visiting forces in Cyprus, or to any provision of the municipal law of Cyprus. In these circumstances it is difficult to view the issues with any width of vision and for my part I feel reluctant, until I can properly survey the field, to do more than deal with the precise points stated in the master's order; more particularly since, on the view which I take, this case cannot be stifled or decided in limine but must go to trial.

Lord Pearson too had this to say ([1969] 2 WLR 926 at p. 959; [1969] 1 All ER 629 at p. 659):

> My Lords, one can readily understand and sympathise with the desire of the parties and their legal advisers and the learned master to save costs by having a preliminary hearing on points of law, because this procedure might avoid the probably heavy expense of taking the oral evidence on the issues of fact. There are, however, disadvantages in this course. The important questions whether the Truce Force and the British elements comprised therein were agents of the Cyprus Government, and whether the actions of the British elements were acts of state of Her Majesty, involve matters of fact as well as legal doctrine. There are no findings of fact. The assumed facts are those pleaded

in paragraph 3 and the first sentence of paragraph 4 of the defence. They are pleaded with the conciseness which is proper to a pleading, and no further particulars have been supplied. The decisions have to be given on the assumed facts.

All said and done, I am bound by the decision of the Supreme Court in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [supra]*. There the Supreme Court held that where the issue raised was solely a question of law, pure and simple, without reference to any facts or where the facts were clear and undisputed, the court should exercise its duty under O. 14 of the RHC just like any other cases and decide that question of law forthwith even though the question of law may be of some difficulty. The Supreme Court too held that the courts hearing an O. 14 application should work within the framework of O. 14 and not simply embark on an exercise under O. 33 r. 2 of the RHC.

Be that as it may, reverting back to the mainstream of the case Mr. Kwan Kin Sum, learned counsel for the plaintiff, argued that the failure to respond to encl. 36 would mean that the defendant admitted every material allegation of facts contained therein (*Overseas Investment Private Limited v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238). Indeed Mr. Jeyakumar Sundralingam, learned counsel for the defendant, made it clear that the defendant was not disputing any material allegation by the plaintiff pertaining to the facts as contained and set out in encl. 36.

The Undisputed Facts Of The Plaintiff's Claim

The plaintiff's claim against the defendant was for goods sold and delivered. The invoices exhibited in encl. 36 represented the amount of actual sale, in monetary value, by the plaintiff to the defendant and that sale was at the request of the defendant which represented the actual loss directly incurred by the plaintiff as a result of the defendant's refusal, failure or neglect to settle the invoices. Further or in the alternative, the plaintiff's claim against the defendant was for breach of a settlement agreement in the previous proceedings *vide* writ of summons no: 22-249-1994 in the High Court of Johor Bahru. It was correctly pointed out by Mr. Kwan Kin Sum that the defendant's non-denial of encl. 36 meant that the defendant admitted the existence and validity of the invoices and the total amount claimed therein.

In the writ of Summons No: 22-249-1994, the plaintiff commenced legal action against the defendant and his three other partners. The plaintiff obtained judgment in default of appearance against the three other partners, namely, Ku Moey Hia (f), Yang Ping Ping (f) and Lim Thiam Hor.

In the writ of summons no: 22-249-94, the plaintiff had originally filed an application against the defendant under O. 14 of the RHC. The application was withdrawn by the plaintiff prior to the hearing because the plaintiff and

the defendant agreed to settle the suit and the terms of the settlement were set out in the letter from the plaintiff's solicitors to the defendant's solicitors dated 22 December 1995. That letter was worded thus (see exh. "KPY-2(e)" of encl. 36):

MBM/tls/1437353 RV/AAR/12769/95/(al)

22nd December 1995

M/s Reginald Vallipuram & Co,
Advocates &Solicitors,
Suite 3 & 4, 15th Floor,
Tun Abdul Razak Kompleks,
Jalan Ah Fook,
80000 Johor Bahru,
Johor.

Fax:07-2241939/
Post
WITHOUT PREJUDICE

Attn: Mr. Reginald Vallipuram

Dear Sirs,

Johor Bahru High Court Suit No: 22-249-94
Guinness Anchor Marketing Sdn Bhd vs Ku Moey Hia (f) and 3 others

We refer to the above matter.

We are instructed by our clients that they are willing to settle their claim against your client if he could unconditionally accept the following terms:

(a) your client hereby expressly acknowledges his liability for the debt of RM1,289,035.98 which is the subject matter of the present proceedings;

(b) our clients will accept a total sum of RM250,000.00 from your client by way of a full and final settlement of their claim above against your client. The said sum of RM250,000.00 is to be paid by your client in the following manner:

(i) RM50,000.00 within two months from the acceptance of the terms of this letter;

(ii) the balance sum of RM200,000.00 thereof by monthly instalment of RM8,333.00 per month beginning from the third month (inclusive) of the acceptance of the terms of this letter or by quarterly payment of RM25,000.00 beginning from the third month (inclusive) of the acceptance of the terms of this letter.

(c) in the event of default of payment of any part of the said sum of RM250,000.00, our clients shall be at liberty to commence proceedings afresh against your client for the above claim in full ie RM1,289,035.98 less whatever payment that may be made by your client. In the event of the fresh legal proceedings being instituted your client hereby expressly

agrees that he shall consent for judgment to be entered against him for the said claim in full ie RM1,289,035.98 less whatever payment that may be made by your client;

(d) this settlement is expressly without prejudice to our clients' right to proceed against the other co-debtors for the claim in full ie RM1,289,035.98 less whatever payment that may be made by your client;

(e) in the event of your client's unconditional acceptance of the terms of this letter, we shall forward to you a notice of withdrawal of the proceedings against your client with no order as to costs and with liberty to file afresh for your execution pursuant to Order 21 Rule 2(4) of the High Court Rules 1980.

Kindly let us have your client's absolute acceptance of the above terms in writing within 14 days hereof failing which our clients' offer shall lapse and our clients shall proceed with the next step of the proceeding forthwith.

Yours faithfully,

Sgd (Illegible)

c.c. to clients - Fax: 7770279/Post
Attn: Miss Janice Kwong
(Ref: Teck Hai Enterprise)

The defendant responded and he unconditionally accepted the said terms of settlement by letter emanating from the defendant himself dated 11 January 1996 as seen in exh. "KPY-2(f)" of encl. 36. That letter was worded as follows:

JOE CHELLAM & PARTNERS,
Advocates & Solicitors,
Commissioner For Oaths

58A Temple Street
Singapore 058603
Telephone:(65)3242826
Facsimile:(65)3242829

Our Re : JC/MISC/yan

Your Ref:

Date : 11 January 1996

M/s Reginald Vallipuram & Co,
Suite 3 & 4, 15th Floor,
Tun Abdul Razak Kompleks,
Jalan Ah Fook,
80000 Johor Bahru,
Johor

BY FAX & POST
FAX NO: 07-2241939

Dear Sirs,

JB HIGH CT SUIT NO: 22-249-94
GUINNESS ANCHOR MARKETING SDN BHD
V. KU MOEY HIA (F) & 3 OTHERS

I refer to the letter dated 22nd December 1995 from M/s Skrine & Co.

I accept the terms contained in that letter unconditionally. Please inform them of my acceptance and ensure that the matter is discontinued.

Yours faithfully

Sgd (Illegible)

and it was transmitted to the plaintiff's solicitors by the defendant's solicitors by letter dated 12 January 1996, as shown below:

REGINALD VALLIPURAM & CO.
PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS

Suite 3 & 4, 15th Floor, Tun Abdul Razak
Kompleks, Jalan Ah Fook, 80000 Johor Bahru.
Tel: 07-2221266, 2221267, 2241268
Fax: 07-2241939

Bil. Kami: RV/CR/12769/95/TY 12th Jan, 1996
Bil. Tuan: MBM/tls/1437353

BY FAX & MAIL

M/s Skrine & Co,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

Re: Johor Bahru High Court
Suit No: 22-249 of 1994
Guinness Anchor Marketing Sdn Bhd
vs Ku Moey Hia (f) & 3 others

Enclosed copy of fax dated 11th January, 1996 that we received from our client which is self explanatory.

Kindly let us have the Notice of Discontinuance for our signature.

Yours faithfully,

Sgd (Illegible)

c.c. client (BY FAX & MAIL)

RECEIVED
12 JAN 1996
SKRINE & CO

It was beyond peradventure that by accepting the terms of the plaintiff's letter in exh. 'KYP-2(e)' of encl. 36, the defendant unconditionally and expressly, *inter alia*:

(i) acknowledged his liability to the plaintiff for the debt of RM1,289,035.98 which represented the actual amount by way of sales invoices owing to the plaintiff by the defendant as at 22 December 1995;

(ii) agreed that in the event of default of payment by the defendant in accordance with the terms as stipulated therein the plaintiff shall be at liberty to commence proceedings afresh against the defendant for the full claim of RM1,289,035.98 and the defendant further expressly agreed that he shall consent for judgment to be entered against him for the full sum of RM1,289,035.98 as claimed by the plaintiff.

Now, as a result of that mutual agreement between the parties, the plaintiff filed a notice of discontinuance dated 15 January 1996 against the defendant as reflected at exh. 'KPY-2(d)' of encl. 36 which was worded as follows:

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
GUAMAN NO: 22-249-1994

ANTARA

Guinness Anchor Marketing Sdn. Bhd.

Plaintif

AND

1. Ku Moey Hia (p)
2. Yang Ping Ping (p)
3. Chellam Joe Vetha Thya Singh
4. Lim Thiam Hor

Defendan-Defendan

NOTIS PEMBERHENTIAN

AMBIL PERHATIAN bahawa plaintif sama sekali memberhentikan tindakan ini terhadap defendan ketiga yang dinamakan di atas di bawah Aturan 21 Kaedah 2 (4) Kaedah-Kaedah Mahkamah Tinggi 1980 di atas terma-terma yang tercatit di dalam surat bertarikh 22hb Disember 1995 daripada peguamcara plaintif kepada peguamcara defendan ketiga sepertimana yang diterima oleh surat bertarikh 12hb Januari 1996 dan lampirannya daripada peguamcara defendan ketiga kepada peguamcara plaintif.

Bertarikh pada 15 haribulan Januari, 1996.

Sgd (Illegible)

...
(Tetuan Skrine & Co.)
Peguamcara bagi pihak
Plaintif.

Sgd (Illegible)

...
(Tetuan Reginald Vallipuram & Co)
Peguamcara bagi defendan ketiga
yang dinamakan di atas.

Kepada:-

Timbalan Pendaftar,
Mahkamah Tinggi,
Johor Bahru.

Notis Pemberhentian ini difailkan oleh Tetuan Skrine & Co., beralamat di Bangunan Straits Trading, No. 4, Leboh Pasar Besar, 50050 Kuala Lumpur, Peguamcara bagi pihak Plaintif yang dinamakan diatas. (MBM/ben/143735.3) (n.dis) Tel No. 2945111).

The Points Of Law Raised By The Defendant's Counsel

Four points of law were raised on behalf of the defendant and I will now examine the first two first:

(1) That since the defendant was sued in his capacity as a partner of Teck Hai Enterprise, the defendant should only be jointly liable for the debt of RM1,289,035.98 pursuant to s. 11 of the Partnership Act 1961.

(2) That the plaintiff was unable to maintain this action as their cause of action had been exhausted with the entry of judgments in default against the other three partners in the previous suit, namely, writ of summons no: 22-249-94.

I will now proceed to examine s. 11 of the Partnership Act 1961 and for this purpose a reproduction of that section is necessary:

Liability of Partners.

11. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

and it is crystal clear that the liability of the defendant as a partner for the debt owing to the plaintiff is one of joint liability with the other partners in the partnership. The essence of joint liability as opposed to joint and several liability under s. 14 of the Partnership Act, 1961 is that if a judgment is obtained against a partner in the partnership for a debt owing by the partnership and the judgment remains unsatisfied because of the partner's bankruptcy or otherwise, any other partner or partners who has or have not been sued in the first instance cannot then be sued in a subsequent new proceeding or proceedings. A joint liability essentially means that there is only one cause of action for the recovery of debt, and that cause of action having been exhausted, a second cause of action or a new proceeding is no longer available against any partner or partners whom the creditor failed to sue at the first instance.

Just like Malaysia, the English law provides that the liability of partners for all debts and obligations are joint. Section 9 of the English Partnership Act 1890 enacts as follows:

> Liability of Partners. 11. Every partner in a firm is liable jointly with the other partners, and Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject in England or Ireland to the prior payment of his separate debts.

and this brings to the forefront of my mind the case of *Henry JB Kendall and Others v. Peter Hamilton* [1879] 4 App Cas 504 HL where the court there decided on the issue of partnership and the doctrine of *res judicata*. In that case an action was brought by the plaintiff against two persons who had borrowed money from the plaintiff and a judgment was obtained. Somehow that judgment remained unsatisfied. The plaintiff subsequently discovered a third person who was a partner with the two persons whom the plaintiff had originally sued. The plaintiff then proceeded to file an action against this third person and the House of Lords rightly held that the action against the third person was not maintainable. Separate judgments delivered by seven Law Lords adorned the pages of the law report and for this purpose I need only refer to the judgment of The Lord Chancellor (Earl Cairns) who explained the concept of joint liability at pp. 23 to 24 of the report in these simple and straight forward words:

> It is the right of persons jointly liable to pay a debt to insist on being sued together. If then there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a further action against the

> third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.

From the factual matrix of the present case, the defendant was initially sued together with his three other partners in the writ of summons no: 22-249-94 by the plaintiff and this very action against the defendant was discontinued due to the settlement agreement as alluded to in the early part of this judgment. These set of facts put the present case miles apart from the facts of *Henry JB Kendall and Others v. Peter Hamilton [supra]* but the principles enunciated by The Lord Chancellor (Earl Cairns) are germane and must be vigorously applied to the present case. It was a total misconstruction on the part of the defendant to interpret the words "joint liability" under s. 11 of the Partnership Act 1961 to mean a partner of a partnership has an equal liability *vis a vis* an outsider limited to the extent and proportion of the shareholdings that the partner holds in that partnership. It is now trite law, so trite that it still requires to be repeated. It is this. That every partner in a partnership is liable to every creditor to the full amount of his demand. If an authority is needed for this simple exposition of the law, reference to the case of *Robinson's Executor's Case* [1856] 6 De GM & G 572; English Reports, Vol. XLIII, Chancery [1904], p. 1356, ought to be sufficient. Briefly, the facts in that case may be stated as follows. By the provisions of a deed constituting a joint stock company it was declared that the proprietor of each share should bring in the sum of 50 pound in respect of such share as and when called upon so to do in the manner thereinafter provided and that each of the proprietors should be entitled to the profits and liable for the losses of the company in proportion to his shares. The question which the court had to decide was whether the sum payable by the executor of Joseph Phelps Robinson, a deceased shareholder, in respect of a call made by the Master under the Winding-Up Acts, was a specialty or a simple contract debts. The court ruled that every shareholder as a partner was liable to every creditor to the full amount of his demand, and the sum raised by the Master represented not any demand of the shareholders inter se, but the aggregate demand of all the creditors on the whole partnership. The court also held that the solvent shareholders were bound to make up this sum not by virtue of any engagement contained in the deed

but rather because by the general rules of law that every partner was liable to the whole of the demand in the partnership. In the body of the judgment, the Lord Chancellor Lord Cranworth had this to say (see pp. 588 and 1362 of the report):

> The argument was that this 3d clause amounted in effect to an engagement under seal on the part of every shareholder to contribute rateably with the other shareholders to the losses of the company, and that the amount of each contributory's call is in effect his share of the losses, to which he thus bound himself to contribute. But I do not think that this is the fair view of the case. What the shareholder has to pay here in consequence of the Master's call, is something which he would have been liable to pay independently of any such stipulation as that contained in the 3d clause. Every shareholder, as a partner, is liable to every creditor to the full amount of his demand, and the sum raised by the Master represents not any demand of the shareholders inter se, but the aggregate demand of all the creditors on the whole partnership. The solvent shareholders are bound to make up this sum, not by virtue of any engagement contained in the deed, but because by the general rules of law every partner is liable to the whole of the demands on the partnership. To put an extreme case, if there had been but one solvent shareholder, there is no doubt a call might have been made on him for an amount equal to all the debts due from the partnership. How could it be said that he was liable to [588] pay that sum because he had been party to a deed in which it was stipulated that every shareholder should be liable to the losses of the company in proportion to his shares? If in such a case the clause in question would not be applicable, neither can it be so when there are many solvent shareholders. In the one case, as in the other, the liability is not the consequence of the stipulation in the deed, but of the general liability of the shareholder to the creditors. When, indeed, the money has been raised and the demands on the partnership have been liquidated, the shareholder who has paid a sum exceeding his rateable proportion, calculated on the number of his shares, will have a right of contribution against the other shareholders, and the extent of that right must be measured according to the provisions contained in the 3d clause of the deed. It is necessary for me to say whether this demand for contribution would be such as to give him a claim by way of specialty or only as a simple contract debt. That must depend on the question whether the words at the end of the 3d clause amount to an engagement to pay, or are merely a declaration as to the proportions in which each shareholder shall be liable.

Then there is the case of *Abbott v. Smith* [1760] 2 Black W 947, 949; English Reports, Vol XCVI, King's Bench Division [1909], p. 559, 560 where it was said that if an action was brought against one partner only, then no advantage can be taken of the omission except by a plea in abatement. That was a case on indebitatus assumpsit. The general issue was pleaded and the verdict was given to the plaintiff. It appeared that at the trial, the defendant Smith and one Robinson were merchants in partnership, and that partnership was a notorious one. That the dealing upon which the action was founded was

transacted between Abbott and Robinson only and upon the partnership account. At the time of bringing the action, the partnership was dissolved. De Grey CJ delivering the judgment had this to say at p. 949 and p. 560 of the report:

> There are two considerations necessary for the court to decide upon in this case –
>
> 1. The nature of the contract; 2. The manner of the suit. The last is consequential upon the former. The contract, when made with partners, is originally a joint contract, but may be separate as to its effects. Though all are sued jointly, and a joint execution taken out, yet it may be executed against one only. Each is answerable for the whole, and not merely for his proportionable part. Equity must be called in to make the rest contribute. A creditor, being party to the contract, is bound both by law and conscience to do all that is necessary to effectuate the contract. He may sue one of his debtors only; but if the defendant calls on him to make all the rest defendants, he shall be obliged to do it. It is just that it should be so:- 1. That all may assist in the defence; 2. That all may enter into a rateable contribution to pay what shall be recovered; 3. To take away all colour and pretence of collusion. Where the suit is only brought against one, the law perhaps cannot do complete justice in the same suit. I know of no writ of contribution. But in another suit, for money laid out for the other's use, contribution may, in effect, be obtained (q). [950] A Court of Equity does complete justice at once, by calling all parties before the Court. So at law, if the defendant means to take advantage of the partnership, it ought to be pleaded in abatement, else it is supposed to be waived. As it is for the benefit of the defendant, he ought to claim it in the earliest stage, and not put the plaintiff to the trouble of making out his case, and then bring this objection after.

Chitty on Contracts, 27th Edn, vol 1, at p. 1473 contained a short paragraph on partners. It is worded as follows:

> Partners are jointly liable for partnership debts and obligations (Partnership Act 1890, section 9-12) and one partner who bears more than his own share of a common obligation is entitled to contribution from the other partners (*Re the Royal Bank of Australia, Robinson's Executors* [1856] 6 De G.M. & G.572, 587-588; Lindley and Banks on Partnership [16th ed] sections 20-04 et seq. Cf. Partnership Act 1890, sections 24(1) and (2), 44), although, if the partnership still subsists, the right to contribution may be enforced only in an action for a general partnership account (*Sedgewick v. Daniell* [1857] 2 H. & N. 319).

The defendant cited and relied on the case of *Osman bin Haji Mohamed v. Chan Kang Swi* [1924] 4 FMSLR 292. The case was mentioned by ER Hardy Ivamy and Vincent-Powell Smith in their book entitled *The Malaysian Law*

of Partnership: Cases and Materials and the report of that case appeared at p. 56 of the book and there the following was reported:

> A firm called 'The Federal Trading Company' consisted of three Chinese partners who managed it, and three Malay sleeping partners. The three managing partners borrowed from a moneylender for the business of the firm and Chan Kian Swi guaranteed the loan in the following terms:
>
> > In consideration of KVAL Muttiah Chetty, Kuala Lumpur, having lent the sum of $10,000.00 [dollars ten thousand only] to Li Kim Chuan, Lim Kian Hock, and LH Kheong managing partners of the Federal Trading Co for a period of four months from date hereof on a Pro note executed on 17 August, 1920, I hereby guarantee and bind myself to pay to KVAL Muttiah Chetty the said sum of $10,000.00 or any balance and interest thereof in the event of failure on the part of the said partners of Federal Trading Company to repay the principal sum or any part thereof with interest then due on the said Pro note.
>
> The moneylender sued for his debt and, the firm failing to pay him, Chan Kang Swi paid the debt and then sued all six partners for the amount thus paid on their behalf. Five admitted liability but the defendant contested the claim.
>
> At the trial Whitley J. admitted evidence to prove the debt was a partnership debt and found *inter alia* that:
>
> > Once other evidence is admitted, it is clear that the loan was obtained for partnership purposes and the money applied to those purposes and that the signatories to the note were authorised to bind the firm. Indeed, these facts are not disputed.
>
> and that:
>
> > With regard to the guarantee note, the language of the document itself leaves no doubt in my mind that the debt guaranteed was the debt of the 'partners of the Federal Trading Company' and not the debt of the three persons named.
>
> and he therefore held all six partners were liable on the guarantee.
>
> The defendant appealed.
>
> Held, by the Court of Appeal:
>
> Since the business was carried on in common for the benefit of all the partners, the defendants were equally liable for the debt. Apart from the oral evidence admitted, there was sufficient evidence upon the face of the promissory note that it was the note of the firm and not merely of the three partners who signed it and that on the true construction of the guarantee note all that was stated to be guaranteed was the debt of the three managing partners, but that apart from the guarantee note there was an obligation on the firm to repay to the plaintiff the money paid to discharge the debt of the firm; the payment to the

moneylender being an act lawfully done for the firm, not intended to be gratuitous, and the benefit of which was enjoyed by the firm, the firm was bound, by section 70 of the Contracts Act, to make compensation to the plaintiff.

My understanding of the case of *Osman bin Haji Mohamed v. Chan Kang Swi [supra]* is this. That case made it clear that insofar as an outsider to the firm was concerned each of the partners of the firm was liable to him jointly and equally irrespective of their proportionate shareholdings. The issue of proportionate contribution based on the partners shareholdings was solely *inter se* between the partners.

Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 FC was relied upon by the defendant especially to a passage in the judgment of Chang Min Tat FJ at p. 103 where his Lordship said:

> Insofar as Order 14 rule 5 is concerned, we agree that in the case of a joint liability, the rule has no application and where a plaintiff had clearly elected to accept the liability of one contractor for that of the other, he is debarred from proceeding against the other.

But that was not a case of joint liability. The appellant in that case sued the respondent for $110,000 being the price for goods sold and delivered. The respondent claimed that the said sum was already paid to the appellant's salesman. The appellant then obtained leave to amend the writ to include the salesman as the second defendant. Judgment in default of appearance was entered against the salesman. The issue that confronted the Federal Court was whether the existence of the judgment barred the appellant from proceeding further against the respondent. The Federal Court noted that the writ as amended contained two distinct causes of actions, one each against the defendants. Now, as the causes of actions were distinct naturally a judgment against one defendant could not prevent the further proceedings against the other defendants.

The correct statement of the law may be stated as follows. Whenever there is a joint liability or an alternative liability and whatever area of substantive law the liability is concerned with, the judgment against one will prevent the instituting of fresh proceedings against the other in the case of joint liability, and likewise the judgment against one will prevent the further proceedings against the other or the instituting of fresh proceedings against the other in the case of alternative liability. Although the consequence is similar in both cases, the underlining rationales are different in scope. In fact, Chang Min Tat FJ in *Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co [supra]* cited with approval the case of *Debenham's Limited v. Perkins* [1925] 133 LT 252 in regard to the doctrine of election and at p. 102 of *Hagemeyer's* case, his Lordship said:

He thought the doctrine of election applied to the case. It is therefore necessary to understand what it exactly means. As explained by Scrutton LJ thus, in *Debenham's Limited v. Perkins* [1925] 133 LT 252 at pp. 254-255:

> When an agent acts for a disclosed principal, it may be that the agent makes himself or herself personally liable as well as the principal. But in such a case the person with whom the contract is made may not get judgment against both. He may get judgment against the principal or he may get judgment against the agent who is liable as principal, but once he has got judgment against either the principal or the agent who has the liability of the principal, he cannot then proceed against the other party who might be liable on the contract if proceedings had been taken against him or her first. This is sometimes explained by the doctrine of election and sometimes by the doctrine that when one has merged a contract in a judgment, one can have only one judgment, and, having merged the contract in the judgment, one cannot use the contract to get a second judgment ... .

And as to the rationale to the phrase "joint liability", Vaughan Williams J in *Hammond v. Schofield* [1891] 1 QB 453 at p. 457 aptly put it as follows:

> It is of course settled law that where one of two joint contractors has been sued to judgment on the joint contract the other contractor may, if subsequently to the judgment an action is brought against him, plead the judgment obtained against his co-contractor in bar of such action; and it seems also to be well settled by a series of cases beginning with *Rice v. Shute* 5 Burr. 2611, and ending with *Kendall v. Hamilton* 4 App. Cas. 504, that the basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract.

A caveat must be placed. The statement of the law as adumbrated above would only apply when the cause of action was only one and the same against all the defendants either jointly or alternatively. It is obvious that the defendant in the present case has a joint liability with the rest of the partners in that writ of summons no: 22-249-94 as the defendant was sued together with his other partners which subsequently was withdrawn by the plaintiff as there was a settlement and that settlement would not bar a fresh proceeding against the defendant when the terms of that settlement was breached by the defendant himself. In short, the further proceedings by the plaintiff against the defendant in the present case was in the nature of a fresh action which, in law, was legitimate and cannot be prevented by law. In my judgment, the cause of action against the defendant was never exhausted. By cl. (c) of the settlement agreement as reproduced in the early part of this judgment, the plaintiff reserved its right to institute fresh proceedings against the defendant. Alternatively, it can also be said that the settlement agreement between the

plaintiff and the defendant constituted a fresh contract between the two parties and flowing from that the present suit was based on that distinct cause of action. Incidentally, it is germane to note that *Hagemeyer Trading Co. (Malaysia) Sdn Bhd v. Gibson Trading Co. [supra]* explicitly laid down the principle of law to the effect that when causes of actions were different, the issue of the respondent there being unable to proceed against the appellant for the reason of the existence of judgments against the appellant's partners did not arise at all.

Undaunted the defendant relied on the case of *Moore v. Flanagan And Wife* [1920] 1 KB 919, but this was not a case of joint liability but rather one of alternative liability where the Court of Appeal held that the plaintiff having signed judgment against the defendant's agent could not afterwards recover judgment against the principal in respect of the same debt. Scrutton LJ at p. 926 had this to say:

> A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them all before the Court. The law upon the point was laid down in *King v. Hoare* [1844] 13 M & W 494 and other cases, and finally by the House of Lords in *Kendall v. Hamilton* [1879] 4 App. Cas 504. So also in the case of an alternative remedy, as in the case of principal and agent, the plaintiff cannot after recovering judgment against the agent proceed against the principal.

I will now proceed to examine the defendant's third point of law. It was worded thus:

> That the stipulation in the said settlement agreement that in the event of default of payment of any part of the sum of RM250,000 the defendant is liable to pay the whole sum of RM1,289,035.98 is a penalty and that pursuant to section 75 of the Contracts Act, 1950 the plaintiff is only entitled to a reasonable compensation based on proof to be determined by the court.

and the defendant argued through Mr. Jeyakumar Sundralingam that cl. (c) of the settlement agreement was nothing more than a penalty and that being the case the plaintiff who was claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in compliance and in accordance with the settled principles in *Hadley v. Baxendale* [1854] 9 Exch. 341; 23 LJ Ex 179. Mr. Jeyakumar Sundralingam further submitted that any failure to prove such damages will result in the refusal of the court to award such damages and he cited *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 FC as an authority. Finally, it was argued that the plaintiff's entitlement to reasonable compensation ought to be ascertained after the presentation of the evidence at the full trial and not by way of a summary application. The case of *Hadley v. Baxendale [supra]* was on remoteness of damage. In that case, the plaintiffs,

owners of a flour mill, contracted with the defendant carriers for the carriage of the crank shaft to Greenwich for use as a pattern for a new crank shaft. The carriage was delayed due to the negligence of the defendants so that the new shaft was received late. The plaintiffs claimed their loss of profits in operating the mill during the delay. The defendants argued that this loss was too remote for them to be liable for it. It was held that the loss of profits was not recoverable. Perhaps the decision of the court in *Hadley v. Baxendale [supra]* may be justified for the following reasons:

(a) The stoppage of the mill did not arise naturally from the carrier's delay because there might have been a spare shaft so that the mill could have kept working.

(b) "Abnormal losses" will only be within the parties' reasonable contemplation if the special circumstances giving rise to the loss were known to both parties at the time of the contract. The carriers had been told only that they were transporting a broken crank shaft to be used as a pattern for a new one. If they had been told that the mill would have to stop or that there was no spare shaft, then the loss of profits could have been recovered.

Here, in the present case, the defendant accepted cl. (c) of the settlement agreement unconditionally. He knew what he had agreed unconditionally to unlike *Hadley v. Baxendale [supra]* where the carriers were not told that the mill would stop work or that there was no spare shaft. The defendant here accepted the full terms of the settlement agreement. It was a final and unqualified expression of assent to the terms of the settlement agreement and that acceptance too was communicated to the plaintiff (*McIver v. Richardson* [1813] 1 M & S 557; *Mozley v. Tinkler* [1835] 1 CM & R 692; *Ex p Stark* [1897] 1 Ch 575; and *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155, 157; *Allied Marine Transport Ltd v. Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 937). It must also be borne in mind that the defendant did not make any cross-offers to the settlement agreement proposed by the plaintiff. Cross-offers would definitely not amount to an acceptance of the offer: *Tinn v. Hoffman & Co* [1873] 29 LT 271, 278.

I am bound by the decision of *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy [supra]*, a decision of the Federal Court. But to me, cl. (c) of the settlement agreement was not a penalty. The crucial question of whether a sum stipulated in a contract is a penalty or liquidated damages is a question of law and Lord Dunedin aptly summed up the law as to what amounts to a penalty or liquidated damages in *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd* [1915] AC 79, 86-88 in roughly these words:

(1) The essence of a penalty is a payment of money stipulated as in torrerem of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage.

(2) Though the parties to a contract who conveniently use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive and final. The court must undertake to determine whether the payment stipulated is in truth a penalty or liquidated damages.

(3) To determine whether a sum stipulated is a penalty or liquidated damages is basically a question of construction to be decided upon the terms and the circumstances of each particular contract, judged at the time of making the contract and not at the time of the breach.

(4) The task of construction is not an easy job and various tests have been advanced to determine whether the sum stipulated is a penalty and not liquidated damages. Thus:

(a) it will be a penalty if the sum stipulated is extravagant and unconscionable in amount when compared with the loss which could be proved flowing from the breach.

(b) it will be a penalty if the breach consists only of not paying a sum of money and that sum is the sum greater than the sum which ought to have been paid.

(c) it will be a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and other but trifling damage."

Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd [supra] received an express approval by the Federal Court in the case of *Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, 471 when Peh Swee Chin FCJ remarked:

> The essence of a penalty is a stipulated payment interrorem of the party breaching the contract whereas in liquidated damages, it is a genuine pre-estimate by both parties of the damages for such breach of contract.

The principles enunciated in *Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd [supra]* have been vigorously applied by other judges in the country and it would be ideal to name some of them:

(1) Raja Azlan Shah J (as His Majesty then was) in *Government of Malaysia v. Thelma Fernandez & Anor* [1967] 1 MLJ 194.

(2) Raja Azlan Shah J (as His Majesty then was) in *Dorothy Kwong Chan v. Ampang Motors Ltd & Anor* [1969] 2 MLJ 68.

(3) Chong Siew Fai J (now Chief Judge Sabah & Sarawak) in *Pershowa Leasing (M) Sdn Bhd v. Kin Shipping Line Sdn Bhd & Ors* [1988] 1 MLJ 540.

(4) VC George J (as he then was) in *Kesang Leasing Sdn Bhd v. Longwood Sdn Bhd & 3 Ors* [1988] 2 MLJ 328.

To my mind, the sum stipulated in the contract was not a penalty as it was not extravagantly or unconscionably greater than the loss which was liable to result from the breach.

The plaintiff claimed for actual loss and this has been proven through the affidavit in encl. 36 which enclosed the relevant invoices. The defendant did not deny the contents of encl. 36 and all the relevant invoices thereto as there was no affidavit in rebuttal filed by the defendant. Plain and simple, it was a case of goods sold and delivered and the refusal of the defendant to settle the invoices. There was a blatant breach of the settlement agreement by the defendant with impunity. Clause (c) of the settlement agreement can never be said to be a penalty and it was not one. It was an uphill task for the defendant all the way. The commendable submission cannot be a basis to say that there were triable issues. One must not forget that one cannot make bricks out of straw.

Finally the fourth point of law was worded thus:

> That the settlement agreement had been superceded by a subsequent agreement and, consequently, the defendant had been discharged from the settlement agreement.

By subsequent agreement, the defendant meant the settlement agreement entered into by the plaintiff with one chargor who had charged her property to the plaintiff to secure payment by the defendant to the plaintiff of the money for the goods sold and delivered to the defendant. It would be ideal, at this juncture, to narrate the facts surrounding that charge.

The debt presently sued for was secured by a charge *vide* presentation no: 20805/901 Jilid 577, Folio 121, dated 6 June 1990 by one Yong Mui Yin (f) – the chargor and hereinafter referred to as the "chargor". The plaintiff had previously instituted proceedings in originating summons no: S3-24-418-1996 in the Kuala Lumpur High Court against the chargor. The plaintiff and the

chargor have agreed to discontinue the charge action upon terms as stated in a letter dated 5 September 1996 from the plaintiff's solicitors to the chargor and such terms were unconditionally accepted by the chargor (see the relevant para. 7 of encl. 36 and the exhibits thereto from "KPY-4(a)" to "KPY-4(e)"). The notice of discontinuance can be seen in exh. "KPY-4(e)" of encl. 36 and it was worded as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)

SAMAN PEMULA NO: S3 24-418-1996

Dalam perkara mengenai Seksyen 256 Kanun Tanah Negara, 1965;

Dan

Dalam perkara mengenai Gadaian Perserahan No. 20805/90, Jilid 577, Folio 121 berkenaan dengan tanah yang dikenali sebagai Lot 19941, Pajakan Negeri 2075, Mukim Petaling.

Antara

Guinness Anchor Marketing Sdn Bhd. .... Plaintif

Dan

Yong Mui Yin (p). .... Defendan

NOTIS PEMBERHENTIAN

AMBIL PERHATIAN bahawa plaintif sama sekali memberhentikan tindakan ini terhadap defendan yang dinamakan di atas di bawah Aturan 21 Kaedah 2(4) Kaedah-Keadah Mahkamah Tinggi 1980 di atas terma-terma yang tercatit di dalam surat bertarikh 5hb September 1996 daripada peguamcara plaintif kepada defendan sepertimana yang diterima oleh surat bertarikh 11hb September 1996 daripada defendan kepada peguamcara plaintif (salinan surat-surat tersebut dikembarkan kepada Notis Pemberhentian ini).

Bertarikh pada 22hb November 1996.

Sgd (Illegible)
...
(Tetuan Skrine & Co.)
Peguamcara bagi pihak
Plaintif

Sgd (Illegible)
...
Yong Nui Yin (p)
Defendan

Kepada:

Timbalan Pendaftar,
Mahkamah Tinggi,
Kuala Lumpur.

Notis Pemberhentian ini difailkan oleh Tetuan Skrine & Co., beralamat di Bangunan Straits Trading, No. 4, Leboh Pasar Besar, 50050 Kuala Lumpur, Peguamcara bagi pihak Plaintif yang dinamakan di atas.

(MBM/nm/1489990B/Document-C) Tel No. 2945111.

The terms of the settlement between the plaintiff and the chargor can be seen in exh. "KPY-4(c)" of enclosure 36, and for brevity it will now be reproduced hereinunder :

MBM/nm/148999.0(Sisk-3)

5th September 1996 WITHOUT PREJUDICE

Madam Yong Mui Yin,
Block 48 #05-109,
Lorong 5, Toa Payoh,
Singapore 310048.

Dear Madam,

KUALA LUMPUR HIGH COURT
ORIGINATING SUMMONS NO: S3-24-418-96
GUINNESS ANCHOR MARKETING SDN. BHD. v. YONG MUI YIN

We refer to the above matter and the recent telephone conversation between your daughter Miss Lim Hui Hui on your behalf and Miss Janice Kwong of our clients.

We have been instructed by our clients to inform you that our clients are willing to withdraw the above suit against you upon the following terms:

a) your acceptance of the terms of this letter constitutes an express acknowledgment of your liability for the principal sum of RM130,000.00 and our clients' solicitors and clients' costs, disbursements and service tax to date amounting to RM11,265.95 claimed against you in the proceedings;

b) you pay to our clients the said sums of RM130,000.00 and RM11,265.95 by 24 equal monthly instalments beginning from 28th September 1996. Your payments will be appropriated towards the principal sum of RM130,000.00 first and thereafter the costs of RM11,265.95;

c) you forward to our clients 24 post-dated cheques in respect of (b) above within 1 week from your acceptance of the terms of this letter;

d) in the event of default of any payment or any part thereof or in the event of your non-compliance with any term of this agreement the whole sums of RM130,000.00 and RM11,265.95 claimed against you or any balance thereof after any part-payment that may be made by you shall be immediately due and payable to our clients and our clients shall be at liberty to commence fresh proceedings against you without further notice. In the event of the fresh legal proceedings being instituted against you, you hereby expressly agree that you would consent for an order for sale and/or a judgment to be made against you;

e) within 1 week after your acceptance of the terms of this letter you will advise us of an address for service in West Malaysia whereby court process in respect of the fresh legal proceedings can be served on you and you dispense with any necessity on the part of our clients to obtain an order to issue the fresh court proceedings and to serve the appropriate papers on you in the Republic of Singapore;

f) upon your acceptance of the terms of this letter and compliance with (c) and (d) above we will prepare appropriate papers for withdrawal of the present proceedings upon the terms of this letter for your execution and you will execute and return the papers to us within 7 days of your receipt of the same;

g) the withdrawal of the present proceedings against you is expressly without prejudice to our clients' rights to proceed with their claim against all the 4 partners of Teck Hai Enterprice ie, Ku Moey Hia (f), Yang Ping Ping (f), Chellam Joe Vetha Thya Singh and Lim Thiam Hor in Johor Bahru High Court Civil Suit No: 22-249-1994 and in any other proceedings.

h) the charge on the charged property which is the subject matter in the present proceedings shall be discharged upon your full payment of the said sums of RM130,000.00 and RM11,265.95 aforesaid.

Kindly let us have your unconditional acceptance of the above terms on or before 11th September 1996 failing which this offer of settlement shall lapse. It must be expressly understood that pending your absolute acceptance of the terms of this letter our clients shall proceed with appropriate steps in the present proceedings. Finally in the event of your acceptance of the terms of this letter, the acceptance must be personally by you and in writing.

Yours faithfully,

Sgd (Illegible)

The chargor had the audacity to forward to the plaintiff twenty-four post-dated cheques for the total sums of RM141,265.95 being settlement of the principal sum of RM130,000 and costs of RM11,265.95 (see the exhibits marked 'KPY-5(a)' to 'KPY-5(f)' of encl. 36). I am advised from the bar that all these twenty-four post-dated cheques have been cleared. To date, the total payment

received from the chargor amounted to RM141,265.95. To me, the settlement agreement between the plaintiff and the chargor was separate and distinct from the settlement agreement between the plaintiff and the defendant. Furthermore, all the payments by the chargor have been taken into consideration by the plaintiff in arriving at the amount of debt which was due and owing to the plaintiff from the defendant.

Quantum

To date the plaintiff received two payments from the defendant by way of a cheque on or about 26 June 1996 for the sum of RM21,085.50 and a further cheque on or about 26 July 1996 for the sum of RM22,000 (see exhs. 'KPY-3(f)' and 'KPY-3(l)' of encl. 36). The plaintiff through its solicitors have on numerous occasions requested the defendant through his solicitors payment of all the outstanding amount which was due and payable pursuant to the terms of the settlement. The defendant failed, refused and neglected to settle any of the balance amount outstanding and owing to the plaintiff pursuant to the terms of the settlement (see para. 6 of encl. 36 and exhs. 'KPY-3(a)' to 'KPY-3(q)' annexed thereto).

At the date of the filing of encl. 37, the debt due and owing to the plaintiff from the defendant was colossal. It came up to RM1,116,456.70 (see para. 10 of encl. 36) and the computation of this colossal amount can be seen in encl. 36 itself. As at 12 August 1998 when encl. 37 was heared the amount of RM1,116,456.70 was further reduced by RM506.22 leaving the outstanding and correct amount due by the defendant to the plaintiff in the sum of RM1,115,950.98 (see para. 11 of encl. 36).

For the reasons adumbrated above, encl. 45 was dismissed with costs.